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No. 90-1451

In the Supreme Court of the United States

OCTOBER TERM, 1990

ALBERTIS C. WILSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether members of the Armed Forces Reserve serving tours of active duty for training prior to the amendment of 10 U.S.C. 1163(d) in 1987 had a right under that statute to remain on active duty until they reached eligibility for retirement from active duty.

2. Whether formal letters from the Secretary of the Army or Air Force or his delegates approving the release of a reserve officer from active duty for training establish that the officer's release was "approved by the Secretary" under 10 U.S.C. 1163(d).

3. Whether reserve officers who do not request to remain on active duty and who are released at the end of their scheduled tours of duty for training are "involuntarily released" from active duty under 10 U.S.C. 1163(d).

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OPINIONS BELOW

The opinion of the en banc court of appeals as to petitioner Wilson (Pet. App. 1a-20a, 63a-64a) is reported at 917 F.2d 529. The amendment to that opinion on rehearing (Pet. App. 63a-64a) is unreported. The opinion of the court of appeals as to the other petitioners (Pet. App. 21a-23a) is unreported. The opinions of the Claims Court as to petitioners Wilson (Pet. App. 24a-33a) and Green (Pet. App. 34a-40a) are reported at 16 Cl. Ct. 765 and 17 Cl. Ct. 716. The opinions of the Claims Court as to the other petitioners (Pet. App. 44a-46a, 47a-49a, 50a-53a, 55a-62a) are unreported.

JURISDICTION

The judgment of the en banc court of appeals as to petitioner Wilson was entered on October 19, 1990, and a petition for rehearing was denied on December 14, 1990 (Pet. App. 63a-64a). The judgment of the court of appeals as to the other petitioners was entered on January 24, 1991, and a petition for rehearing was denied on February 14, 1991 (Pet. App. 65a). The petition for a writ of certiorari was filed on March 14, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. After having served 16 years on active duty in the Army, Petitioner Wilson was honorably discharged in 1980 and was commissioned as an officer of the United States Army Reserve. Pet. App. 2a. Between 1980 and 1983, he served several tours of active duty for training. On October 3, 1983, he received orders to report for a 179-day tour of active duty for training. During that tour, he was scheduled to reach a total of 18 years of regular active duty service plus active duty for training, two years short of the 20 years required for retirement. *Ibid.* He wrote to Army headquarters requesting that he be retained on active duty pursuant to the "sanctuary" provision of 10 U.S.C. 1163(d) (1982), which at that time provided:

> Under regulations to be prescribed by the Secretary concerned, which shall be as uniform as practicable, a member of a reserve component who is on active duty and is within two years of becoming eligible for retired or retainer pay under a purely military retirement system, may not be involuntarily released from that

> duty before he becomes eligible for that pay, unless his release is approved by the Secretary.[1]

There is no record of a response to petitioner Wilson's letter. On March 28, 1984, he was released from his tour of active duty for training and returned to civilian status. Pet. App. 3a.

Petitioners Green, Weissenberger, Nelson, and Olson (the Green petitioners) were in similar, but not identical, situations. All were reserve officers who had served substantial periods of active duty in the military prior to the amendment of 10 U.S.C. 1163(d) in 1987. All served periods of active duty for training during which they reached a cumulative total of 18 years of regular active duty plus active duty for training, two years short of the 20 years required for retirement. Pet. App. 37a. Like petitioner Wilson, all of the Green petitioners except Harvey filed requests for extension of their tours of active duty for training while serving those tours and prior to the amendment of 10 U.S.C. 1163(d) in 1987. Pet. App. 22a-23a. Unlike Wilson, the involuntary releases of petitioners Green, Weissenberger, and Olson were approved by the Secretary of the Army, through his delegate. The Acting Secretary of the Air Force approved the involuntary release of petitioner Nelson. *Ibid.* Petitioner Harvey did not file a request for extension of his tour of active duty for training until after his release from that tour, and that request was subsequently denied. *Id.* at 23a.

2. Petitioner Wilson sued the United States in the Claims Court, contending that his release from active duty in 1984 was in violation of 10 U.S.C. 1163(d). The court granted judgment for Wilson, relying primarily on *Ulmet* v. *United*

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[1] In 1987, 10 U.S.C. 1163(d) was amended to insert "(other than for training)" after "active duty." Act of Dec. 30, 1987, Pub. L. 100-224, § 4, 101 Stat. 1538.

States, 822 F.2d 1079 (1987), in which the Federal Circuit held that an individual on active duty for training is on "active duty" for purposes of Section 1163(d)'s sanctuary. Pet. App. 27a.

The en banc United States Court of Appeals for the Federal Circuit reversed. Pet. App. 1a-15a. The court concluded that the sanctuary provision as originally enacted in 1956 was not intended to apply to reserve officers serving on active duty for training, *id.* at 10a-11a; that the 1962 codification was not intended to effect a substantive change, *id.* at 11a; and that Congress in 1987 made clear that it never intended the statutory provision to apply to active duty for training. *Ibid.* In addition, the court found as an independent basis for its decision that deference is due to the consistent administrative interpretation that an individual may not become eligible for Section 1163(d) sanctuary while on active duty for training. Pet. App. 13a (citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984)). Consequently, the court overruled *Ulmet*. *Id.* at 14a. Judge Archer concurred in the result without opinion. *Id.* at 15a.

Judge Mayer dissented. Pet. App. 16a-20a. In his view, considerations of stare decisis made it inappropriate to overrule *Ulmet*. Pet. App. 16a-17a. In addition, he would have held that the language of the statute supported *Ulmet* and was inconsistent with the en banc court's result. Pet. App. 18a.

3. The Green petitioners also sued the United States in the Claims Court, claiming the benefit of the sanctuary provision. In decisions rendered prior to the Federal Circuit's en banc decision in *Wilson*, the Claims Court agreed with their contention that, under *Ulmet*, they could apply for sanctuary under Section 1163(d) while on active duty for training. Pet. App. 37a, 45a, 49a, 50a. Nevertheless, the court denied their claims. With respect to petitioners Green,

Weissenberger, Nelson, and Olson, the court concluded that the appropriate Secretary of the service involved had "approved" the release within the meaning of Section 1163(d), thus making the release lawful. Pet. App. 38a-40a, 45a, 52a-53a. The Claims Court denied petitioner Harvey's claim solely on the ground that his release had not been "involuntary," since Harvey had not requested an extension under Section 1163(d) before his tour of duty ended. Pet. App. 49a.[2]

The appeals of the Green petitioners were decided by the Federal Circuit after its en banc decision in Wilson's case. After initially affirming the Claims Court's decision in reliance solely on the en banc decision in *Wilson*, a panel of the Federal Circuit withdrew its opinion and issued a brief new opinion affirming the Claims Court's decisions on the ground that "the Claims Court properly applied the correct law." Pet. App. 23a.

ARGUMENT

The decisions of the Federal Circuit were correct and not in conflict with any decision of this Court or any other court of appeals. Furthermore, in light of the 1987 amendment to Section 1163(d), the issues decided by the Federal Circuit have no continuing importance. Further review is therefore unwarranted.

1. Prior to 1987, Section 1163(d) provided that reserve members may not be "involuntarily released" from "active duty" within two years of eligibility for retirement pay, absent approval by the appropriate Secretary. The Federal Circuit correctly held in *Wilson* that the term "active duty," as used in Section 1163(d) prior to its 1987 amendment, did not include active duty for training.

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[2] The government did not contest Olson's claim for active duty pay for a three-month period in 1987. Pet. App. 61a.

Section 1163(d) was originally enacted in 1956. Act of July 9, 1956, ch. 534, § 265, 70 Stat. 517. The statute was codified as 50 U.S.C. 1016 (Supp. IV 1958). At that time, another provision of Title 50 defined the term "active duty" as "full-time duty in the active military service of the United States, *other than active duty for training*." 50 U.S.C. 901(b) (1952) (emphasis added). Thus, as the Federal Circuit observed, "the problem of ascertaining Congressional intent in this case is not difficult." Pet. App. 11a. At the time the statute was enacted, the term "active duty," as used in what is now Section 1163(d), plainly excluded active duty for training. See Pet. App. 10a-11a.

Between the enactment of what is now Section 1163(d) and its amendment in 1987, there were two major recodifications of the military provisions of the United States Code, in 1956 and 1962. Petitioners' essential claim is that the combined effect of the two recodifications was sufficient to change the meaning of the sanctuary provision as originally enacted. See Pet. 10-12. That claim was properly rejected by the court of appeals.

Later in 1956, after the enactment of what is now Section 1163(d), Congress recodified the military statutes. Among the many changes that Congress made at that time was the addition of a definition of "active duty" in Title 10, which included active duty for training. Act of Aug. 10, 1956, ch. 1041, § 101(22), 70A Stat. 5.[3] In addition, Congress repealed the definition of "active duty" in Title 50 that had excluded active duty for training. 70A Stat. 644 (repeal provisions). The 1956 recodification had no effect on the meaning of Section 1163(d). First, the recodified definitional provision of Title 10 provided that "the following definitions [including the new definition of 'active duty']

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[3] The new definition was based on the definition of the term "active Federal service" formerly found in 10 U.S.C. 1036e(d) (1952).

appy in this title." 10 U.S.C. 101 (Supp. IV 1958) (emphasis supplied). Yet what is now Section 1163(d) remained in Title 50. Thus, the change in the definitional provision in Title 10 had no effect on the meaning of the term "active duty" as used in what is now Section 1163(d). Second, it is clear that Congress did not intend to make substantive changes in the military statutes in the course of the recodification. S. Rep. No. 2484, 84th Cong., 2d Sess. 19 (1956) ("The object of the new titles has been to restate existing law, not to make new law."). Obviously, a change in the meaning of "active duty" in what is now Section 1163(d) would have been a substantive change.

In 1962, there was another recodification, in which Congress moved the "sanctuary" provision from Title 50 to Title 10, becoming 10 U.S.C. 1163(d). Although Title 10 now included a definition of "active duty" that included active duty for training and was thus inconsistent with the meaning of that term in what is now Section 1163(d), the legislative history of the recodification makes clear that the recodification was "not intended to make any substantive change in existing law." S. Rep. No. 1876, 87th Cong., 2d Sess. 6 (1962). The Federal Circuit therefore correctly held that the 1962 recodification should not be taken to have changed the meaning of Section 1163(d). As this Court has stated, "it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed." *Fourco Glass Co.* v. *Transmirra Corp.*, 353 U.S. 222, 227 (1957). Accordingly, the Court has frequently refused to give effect to apparent changes in statutory meaning that are introduced as unintended artifacts of a recodification. *Cass* v. *United States*, 417 U.S. 72, 81-82 (1974) (discussing the same 1962 recodification involved here); *Goldstein* v. *Cox*, 396 U.S. 471, 477-78 (1970) (1948 recodification of the Judicial Code). Here, Congress's intent not to change the law was

clearly expressed, and the Federal Circuit's decision in *Wilson* correctly implemented that intent.[4]

2. The Federal Circuit also correctly affirmed the Claims Court's holdings that the Secretaries of the Army and Air Force gave the appropriate approval for the release of all petitioners but Wilson and Harvey.[5] The other petitioners assert (Pet. 16-17) that the Secretarial approvals of the decisions to release them were invalid procedurally because Section 1163(d) is prefaced by the phrase "[u]nder regulations to be prescribed by the Secretary concerned," and no regulations governing Section 1163(d) have ever been promulgated. The statute does not, however, expressly condition the Secretary's authority to approve releases on the promulgation of regulations, and petitioners cite no authority for imposing such a requirement.

Petitioners also contend (Pet. 17-18) that the Secretarial approvals were substantively invalid because they were intended to "subvert" Section 1163(d). See Pet. 18. Yet, as the Claims Court held, the service Secretaries have broad

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[4] The Federal Circuit's interpretation is also supported by the 1987 legislation that amended the sanctuary provision to apply only to reservists "on active duty (other than for training)." Act of Dec. 30, 1987, Pub. L. No. 100-224, § 4, 101 Stat. 1538. The sponsor of the amendment in the House stated that its purpose was "to prevent a windfall never intended by law for a small group of reservists." 133 Cong. Rec. 35,821 (1987) (Rep. Byron). The sponsor of the bill in the Senate stated that the purpose of the legislation was to make a "technical correction" that "restores the original definition" and eliminates the "unintended effect" of the recodification. 133 Cong. Rec. 36,064 (1987) (Sen. Glenn). See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969); *Bell* v. *New Jersey*, 461 U.S. 773, 784 (1983).

[5] Although Wilson filed a request for extended active duty pursuant to the sanctuary provision, there is no record of any action taken on that request or of any approval of his release by the Secretary of the Army or his delegate. Petitioner Harvey's case is discussed at p. 9, *infra*.

authority, both in 10 U.S.C. 1163(d) and elsewhere, to release a reserve member from active duty. Pet. App. 40a (citing cases). The Secretary could reasonably conclude, without undermining the statute (even as construed by the now-overruled *Ulmet* decision), that petitioners' retention on active duty would not be in the best interests of their respective services.

3. Unlike the other Green petitioners, petitioner Harvey did not apply for extended active duty pursuant to the sanctuary provision until November 10, 1987, almost four years after he completed his most recent tour of active duty for training on January 27, 1984. See Pet. App. 49a. The Federal Circuit correctly affirmed the Claims Court's holding that his release was not "involuntary" within the meaning of Section 1163(d).

Petitioners' interpretation of Section 1163(d) would entail that tours of active duty for training of reserve members who reach the 18-year level of service would be extended for two years even if the reserve member did not request such an extension. As the Claims Court noted in adjudicating petitioner Green's claim, however, "[m]ost Reserve members serving short active duty training tours, and also having civilian career responsibilities," would not "welcome an interpretation that such brief training tours must automatically be extended two years under 10 U.S.C. § 1163(d) when the 18 years service point is reached." Pet. App. 39a. Therefore, a release should be held to be "involuntary" under 10 U.S.C. 1163(d) only if "the Reserve member * * * duly requests an amendment extending the tour" of duty. Pet. App. 39a. Because Harvey made no such request, his release accorded with the expectations of the parties at the time of his service and was not "involuntary" within the meaning of Section 1163(d). See Pet. App. 49a (rejecting Harvey's claim for reasons given in the *Green* decision).

4. Petitioners do not assert that the Federal Circuit's decisions in these cases conflict with any decision of any other court of appeals. In addition, the 1987 amendment to Section 1163(d) makes clear that the term "active duty" in Section 1163(d) excludes "active duty for training." See note 1, *supra*. The amendment therefore definitively precludes claims like those of petitioners arising after December 30, 1987. Accordingly, the issues presented in this case have no continuing importance. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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